JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 638

LEO CRUMLEY,
Petitioner,

v.

THE STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

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THE STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, LEO CRUMLEY, defendant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Tennessee which was entered against him on June 16, 1969, in the case of the **State of Tennessee v. Leo Crumley.** A copy of the order of the Tennessee Supreme Court is printed in the Appendix hereto.

OPINIONS BELOW.

The opinion of the Criminal Court of Marion County, Tennessee is printed in the Appendix hereto, *infra,* Appendix A and Appendix B (pp. A-1 and A-3). The order of the Court of Appeals of the State of Tennessee is unreported and is printed in the Appendix hereto, *infra,* pp. A-5-A-7. The order of the Supreme Court of the State of Tennessee which was entered on June 16, 1969, is unreported and is printed in the Appendix hereto, *infra,* p. A-8.

JURISDICTION.

The judgment of the Supreme Court of the State of Tennessee, denying the petition for writ of certiorari was entered on June 20, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED.

Should the trial court have permitted witness Lee Beene to be present in the courtroom during the testimony of witness William S. Bynum in violation of the rule of exclusion of witnesses?

STATEMENT OF THE CASE.

On June 5, 1967 indictments were filed charging the defendant-appellant Leo Crumley, and a co-defendant, Robert Cross, with possession of burglary tools and third degree burglary on or about February 20, 1967. The two cases were consolidated for trial. The prosecutor in the third degree burglary case was police officer Beene and the prosecutor in the possession of burglary tools case was

Jeff Payne. Officer William S. Bynum was a witness in both cases and was called upon to testify after prosecutor Payne but before prosecutor Beene. Over counsel's objections, the court said that since officer Beene was a prosecutor in one of the cases, the rule of exclusion of witnesses wasn't applicable to him. By so ruling, the trial court allowed officer Beene to hear the testimony of non-prosecuting witness Bynum, the officer who assisted him in making the arrest, before he testified himself (App. p. 4-6; Tr. 18-20).

On July 5, 1967, after the jury trial and a plea of not guilty, the jury found the defendant, Leo Crumley, guilty of possession of burglary tools and third degree burglary, and the defendant was sentenced in the third degree burglary case to three years and on the possession of burglary tools to one to three years in the state penitentiary. On October 6, 1967, the Trial Court overruled the defendant's motion for a new trial. An appeal was perfected to the Criminal Court of Appeals, where the judgment of the Trial Court was affirmed. The Supreme Court of Tennessee denied certiorari June 16, 1969, the Court giving no reasons for its decision.

REASONS FOR GRANTING THE WRIT.

> "The purpose of sequestrating witnesses is to detect falsehood as well as to prevent any witness from coloring his, or her, testimony either purposely or through influence by talking to other witnesses and hearing them talk."
>
> **Nance v. State**, 358 S. W. 2d 327, 210 Tenn. 328 (1962).

> "The practice of putting witnesses under the rule is a time-honored one and should not be abandoned . . . [W]itnesses may, and often do, shape their testi-

mony to match that given by other witnesses within their hearing. To prevent such matching of testimony is the prime purpose of putting witnesses under the rule."

Charles v. United States, 215 F. 2d 825 (1954).

The best analysis of the rule of exclusion is found in **Wigmore on Evidence**, TE, Vol. VI, Section 1837, et seq. The reason for the rule of exclusion is obvious. Wigmore uses the example of the story of Daniel's Judgment of Susanna's case from the Scriptures where two witnesses bore false witness against Susanna. Daniel had the witnesses brought before him separately and discrepancies in their testimony showed the falsity of their testimony. Wigmore states that sequestration of witnesses is properly demandable as a matter of right (Section 1839):

"It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defense that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, and in the case when it is most useful (namely, a combination to perjure), it is almost the only hope of an innocent appellant."

Section 1838 of **Wigmore** states that:

"If the hearing of an opposing witness were permitted the listening witnesses could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventive; i. e., it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony."

"Where the prosecutor is allowed to remain in the courtroom, the court should impose as a condition that the prosecutor be used as the first witness."

Smart v. State, 112 Tenn. 539, 551, 80 S. W. 586 (1903).

In this case the witness Beene was listed as a prosecutor and should have either been used as the first witness or have been excluded from the courtroom during the testimony of Officer Bynum. There were conflicts in their testimony even though Officer Beene remained in the courtroom and it can only be concluded that further conflicts would have resulted had Officer Beene been excluded from the courtroom during that testimony.

This is a matter of broad nationwide concern to all criminal defendants who are confronted with witnesses testifying against them. Therefore, it is respectfully submitted that the Trial Judge's failure to apply the exclusion rule unfairly prejudiced the state's witnesses to the detriment of the Petitioner.

CONCLUSION.

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN D. LANE,
Stahlman Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

APPENDIX

APPENDIX A.

State of Tennessee,
vs. } No. 8767.
Leo Crumley.

In the Circuit Court of Marion County, Tennessee.

Indictment for Burglary in 3rd Degree.

Guilty of Burglary in 3rd Degree.

Came the Attorney General who prosecutes for the State and the defendant in proper person and by Attorney Jerome Ables and said defendant being arraigned upon the indictment, pleads (not) guilty to the same; and it appearing to the Court that the defendant has heretofore seasonably made a motion to be allowed to waive his right to a trial by jury and to submit this case to the trial judge for decision both as to guilt and punishment, pursuant to the provisions of Sections 40-2504 and 40-2708, T. C. A., which said motion was concurred in by the District Attorney General and granted by the Court and attested by the defendant and his attorney and spread upon the minutes of the Court. The Court thereupon proceeded to hear all of the evidence and argument of counsel and after due consideration found the defendant guilty of Burglary in 3rd degree, as charged in the indictment and fixed his punishment at imprisonment in the State Penitentiary for (not more than) three years. It Is, Therefore, Ordered and Adjudged that said defendant, Leo Crumley, for the offense aforesaid, be sentenced to the Penitentiary for an indeterminate sentence of not less than 3 years nor more than 3 years according to the rules and regulations thereof. (Further ordered that the defendant be infamous and be disqualified to exercise the elective franchise. Having been

convicted of a felony other than manslaughter, as aforesaid, it is Ordered that said defendant is also disqualified from holding any office under this State. Defendant will pay the costs of this prosecution for which execution will issue. The Clerk will furnish a certified copy of the indictment in this case and a certified copy of this judgment for the Warden of the Penitentiary to be delivered with said defendant; and defendant is allowed credit for 2 days spent in jail in connection with this case.

The defendant, through his Attorney, gave notice of the filing of a motion for a new trial and is allowed 30 days from the entry of this judgment within which to prepare and file said motion, pending which his bail bond is fixed at the sum of $3,000.00.

APPENDIX B.

State of Tennessee,
vs. } No. 8768.
Leo Crumley.

In the Circuit Court of Marion County, Tennessee.

Indictment for Carrying Burglarious Instruments.

Guilty of Carrying Burglarious Instruments.

Came the Attorney General who prosecutes for the State and the defendant in proper person and by Employed Attorney, Jerome Ables, and said defendant being arraigned upon the indictment, pleads (not) guilty to the same; and it appearing to the Court that the defendant has heretofore seasonably made a motion to be allowed to waive his right to a trial by jury and to submit this case to the trial judge for decision both as to guilt and punishment, pursuant to the provisions of Sections 40-2504 and 40-2708, T. C. A., which said motion was concurred in by the District Attorney General and granted by the Court and attested by the defendant and his attorney and spread upon the minutes of the Court. The Court thereupon proceeded to hear all of the evidence and argument of counsel and after due consideration found the defendant guilty of Carrying Burglarious Instruments as charged in the indictment and fixed his (her) punishment at imprisonment in the State Penitentiary for (not more than) three years. It Is, Therefore, Ordered and Adjudged that said defendant, Leo Crumley, for the offense aforesaid, be sentenced to the Penitentiary for an indeterminate sentence of not less than One year nor more than 3 years, according to the rules and regulations thereof. Further ordered that the defendant be infamous and be disqualified to exercise the

elective franchise. Having been convicted of a felony other than manslaughter, as aforesaid, it is Ordered that said defendant is also disqualified from holding any office under this State. Defendant will pay the costs of this prosecution for which execution will issue. The Clerk will furnish a certified copy of the indictment in this case and a certified copy of this judgment for the Warden of the Penitentiary to be delivered with said defendant; and defendant is allowed credit for 2 days spent in jail in connection with this case.

The defendant, through his Attorney, gave notice of the filing of a motion for a new trial and is allowed 30 days from the entry of this judgment within which to prepare and file said motion, pending which his bail bond is fixed at the sum of $2,000.00.

APPENDIX C.

IN THE COURT OF CRIMINAL APPEALS,
NASHVILLE, TENNESSEE,
MARION COUNTY.

Leo Crumley, v. State of Tennessee.	Offense: No. 8767—Burglary, 3rd, No. 8768—Carrying Burglarious Instruments.

Petition to Rehear Granted; Judgment Heretofore Entered Set Aside; Judgments of Trial Court Affirmed.

Judgment.

This cause coming on further to be heard on a petition to rehear filed by the State of Tennessee, and reply thereto filed on behalf of the plaintiff in error, Leo Crumley; and on consideration thereof, this Court is of opinion that the conflict in the record should be resolved by application of the rule that the bill of exceptions prevails over the minute entries when they are in conflict, and is, therefore, constrained to grant the petition to rehear and set aside the judgment heretofore entered; and it is accordingly so ordered and adjudged by this Court.

Upon further consideration of the entire record in this cause, this Court is of opinion that there is no reversible error on the record and that the judgments of the Court below should be affirmed.

It is, therefore, ordered and adjudged by this Court that the plaintiff in error, Leo Crumley, for his offense of burglary in the third degree, Case No. 8767, be delivered to the Warden of the Penitentiary, or his agent, and be

by him committed to the Penitentiary of the State of Tennessee, and there confined at hard labor for a term of not less than three years nor more than three years, commencing on the date of his reception at said Penitentiary; and that the plaintiff in error be rendered infamous and disqualified from holding any office under this State or exercising the elective franchise.

It is further ordered and adjudged by this Court that the plaintiff in error, Leo Crumley, for his offense of carrying burglarious instruments, Case No. 8768, be delivered to the Warden of the Penitentiary, or his agent, and be by him committed to the Penitentiary of the State of Tennessee, and there confined at hard labor for a term of not less than one year nor more than three years, commencing on the date of his reception at said Penitentiary; and that the plaintiff in error be rendered infamous and disqualified from holding any office under this State or exercising the elective franchise.

The sentences of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement in each case will be certified to the Warden by the Clerk of the Court below.

The plaintiff in error will pay the costs accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the Circuit Court of Marion County directing that Court to proceed with the collection of the costs of the case accrued in Case No. 8767 and Case No. 8768 in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Marion County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly cer-

tified copy hereof to the Warden of the Penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $4,000.00 for his appearance in the Supreme Court; and in default of such bond, he will be remanded to the Sheriff of Marion County.

APPENDIX D.

SUPREME COURT, NASHVILLE,
MARION COUNTY.

Leo Crumley,
v.
State of Tennessee.
(No. 8767 and No. 8768.)

Upon consideration of the petition for a writ of certiorari herein to the Court of Criminal Appeals, Middle Division at Nashville, the said petition is hereby denied.

The Clerk of this Court will issue duly certified copies of this Order to the Clerk of the Circuit Court of Marion County, the Sheriff of Marion County and the Warden of the State Penitentiary.

APPENDIX E.

EXCERPT FROM TRANSCRIPT.

[18] Q. Now, when you arrested Mr. Crumley in the culvert, is that located in the direction of—One moment please. Mr. Lee Beene just walked in the court room, is he subject to the rule your Honor?

The Court: Well, he's the prosecutor. Are you trying two (2) cases or one (1)?

Mr. Kildgore: Is he the prosecutor in this case, General?

General Templeton: Yes. Two (2).

Mr. Kildgore: Will you please come around here Mr. Beene.

Mr. Ables: Your Honor, is Mr. Beene the prosecutor?

The Court: They say he is, I don't know. We're trying two (2) cases.

Mr. Ables: I object to that, he's been in the court room.

The Court: No, he just come in, just walked in there now. What is he, a prosecutor?

Mr. Kildgore: Yes, he is, Your Honor, one of the prosecutors.

The Court: All right, in one (1) of the cases.

Mr. Kildgore: He's the prosecutor in possessing burglary tools and Jeff Payne is the prosecutor in the burglary case.

Mr. Ables: I want to object to Mr. Beene being in [19] here now.

The Court: Well, we're trying them both together, he has a right to be in here if he's a party, trying both cases together here. Go ahead.

Mr. Kildgore: Now, the place where you found Mr. Crumley is that located in the direction which he had run?

A. Yes, sir, almost in a straight line.

Q. From Jeff Payne's place? A. Yes, sir.

Q. You say you took Mr. Crumley to the hospital? A. Yes, sir, we did.

Q. And after you returned from the hospital where did you take him? A. To the City Jail.

Q. City Jail. When you took him to the hospital were you present when he was examined? A. Yes, I was.

Q. And, did a doctor examine him? A. No, sir, they was a nurse examined him.

Q. Did you assist in this examination? A. Well, I——

Mr. Ables: (Interposing) Your Honor, I object to whether he assisted in it or not. I don't think Mr. Bynum can testify——

The Court: (Interposing) Well, let's find out what [20] he's going to testify to. He just asked him if he assisted in it, he could have pulled his shoes off or undone his——

Mr. Ables: (Interposing) Let's go a little bit further.

The Court: Well, let's wait till he goes a little bit further.

Mr. Ables: About Mr. Beene being in here. They've got as witnesses Jeff Payne and William Bynum.

The Court: Well, if he's not a prosecutor he'll have to get outside.

Mr. Ables: David Lee Beene and William Bynum, on both of these copies of the indictment, they've got David Lee Beene.

The Court: Well, David Lee Beene, that's him.

Mr. Ables: Yes, sir, as witnesses.

The Court: They've got a prosecutor out here as David Lee Beene, prosecutor.

Mr. Ables: And also as a witness, Your Honor.

The Court: Well of course, he's going to be a witness, Jeff Payne is also a prosecutor and he's also a witness, he was the witness that went before the Grand Jury.

Mr. Ables: We object to Lee Beene being——

The Court: (Interposing) You've got a right to object. The law gives you that right.

Mr. Ables: Note our exceptions, Your Honor.

* * * * * * *

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 23 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 638

LEO CRUMLEY,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari To the Supreme Court of Tennessee.

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,
Supreme Court Building,
Nashville, Tennessee 37219,

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Supreme Court Building,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. .....

LEO CRUMLEY,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari To the Supreme Court of Tennessee.

OPINION BELOW.

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on April 8, 1969 and since a correct copy of said opinion is not attached to the petition in this case, a certified copy of the same is attached hereto as Appendix A. A correct copy of the order of the Tennessee Supreme Court denying Petitioner a writ of certiorari, also unreported, entered on June 16, 1969, is also attached to the petition in this case.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition. However, the Respondent directs attention to the fact that the petition seeks a writ of certiorari directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals of Tennessee. Therefore, the Respondent respectfully submits that the petition seeks a writ of certiorari directed to the improper court.

QUESTION PRESENTED.

The Respondent is dissatisfied with the presentation of the question involved by the Petitioner, and, therefore, pursuant to **Rule 40 (3)** of the **Supreme Court Rules**, presents the question as follows:

(1) Whether or not the Petitioner was denied a fair trial by the action of the trial judge in allowing the State's witness, Officer David Lee Beene, to be present in the courtroom during the testimony of another State's witness, Officer William S. Bynum, in violation of the rule of exclusion of witnesses, where Officer Beene was the prosecutor in one (1) of the two (2) cases against the Petitioner being tried together at the Petitioner's request.

STATEMENT OF THE CASE.

The Petitioner Leo Crumley, was jointly indicted with one Robert Cross on June 5, 1967, by the Grand Jury of Marion County, Tennessee, upon three (3) charges, namely (1) burglary in the third degree, (2) attempt to commit burglary, and (3) possession of burglarious instruments or tools. All three (3) cases came on for trial only against the Petitioner on July 5, 1967, before the Honorable Albert F. Sloan, Judge, and a jury, in the Circuit Court of Marion County, Tennessee, at Jasper, Tennessee, upon the Petitioner's not guilty pleas. Upon defense counsel's insistence that all three (3) cases be tried together on this date, the State's attorney, concluding that there was a lack of sufficient jurors available to try all three (3) cases, voluntarily dismissed the case of attempted burglary. Thereafter, upon the conclusion of all the proof, the argument of counsel, and the charge by the judge, the jury found the Petitioner guilty of both the remaining charges and sentenced him to confinement in the Tennessee State Penitentiary for a period of three (3) years upon the burglary conviction and three (3) years confinement upon the conviction of possession of burglarious instruments or tools. Judgment was entered in accordance with the jury's verdict and upon the overruling of the Petitioner's motion for a new trial on October 4, 1967, the Petitioner prayed for, was granted and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee assigning only the same alleged error as is presented herein. The Court of Criminal Appeals of Tennessee in an unreported opinion filed on December 30, 1968, reversed these convictions because of a conflict between the minute entries and the bill of exceptions in the record. Upon considering and granting a petition to rehear filed by the Respondent, the Court of Criminal Appeals of Tennessee in an unre-

ported opinion filed on April 8, 1969, reversed its earlier opinion, corrected the aforesaid opinion, and affirmed both the Petitioner's convictions. On June 16, 1969, the Tennessee Supreme Court denied the Petitioner's petition for a writ of certiorari.

ARGUMENT.

I.

The only question raised by the Petitioner is whether or not he was denied a fair trial by the action of the trial court in allowing the State's witness, Officer David Lee Beene, to be present in the courtroom during the testimony of another State's witness, Officer William S. Bynum, in violation of the rule of exclusion of witnesses, where Officer Beene was the prosecutor in one (1) of the two (2) cases against the Petitioner being tried together at his request.

As hereinbefore stated, there were two (2) cases against the Petitioner which were consolidated or being tried together on July 5, 1967, at the request of the Petitioner. The named prosecutor in the possession of burglarious instruments indictment was Mr. David Lee Beene, a special police officer for the City of South Pittsburg, Tennessee, whom, as that indictment revealed, appeared as a witness before the Marion County, Tennessee Grand Jury. Mr. J. A. (Jeff) Payne, owner of the burglarized business house herein involved, was the named prosecutor in the third degree burglary indictment and said indictment also showed that he appeared as a witness before the aforesaid Grand Jury. The record shows that Officer Beene had personally observed the Petitioner, Mr. Cross and another man breaking into the said Mr. Payne's business house, and had personally assisted in the arrest of the Petitioner and Mr. Cross. The record showed that Mr. William S. Bynum was a regular police officer for the City of South Pittsburg, Tennessee; that he apprehended and arrested Mr. Cross at the scene of these crimes and that he appeared as a witness before the Marion County, Tennessee Grand Jury in these matters.

After the jury was selected, the witnesses were sworn and placed under the rule of exclusion or sequestration of witnesses. Mr. J. A. (Jeff) Payne, the prosecutor in the third degree burglary charge, completed his testimony. Officer Beene on direct examination testified about the Petitioner's breaking into and entering Mr. Payne's business house and about the arrest of the Petitioner. After the foregoing had occurred, one of the State's Attorneys in the case advised the court that Officer Beene had just entered the courtroom and asked the court whether he was subject to the rule of exclusion or sequestration of witnesses. The trial court held, over objection, that since Officer Beene was a prosecutor in one (1) of the two (2) cases tried together he could remain in the courtroom. The record showed that both these cases arose out of the same incident.

In the case of **Smartt v. State**, 112 Tenn. 539, 80 S. W. 586 (1903), relied upon by the Petitioner herein, the Tennessee Supreme Court held, *inter alia,* that it was not error for a trial judge to allow a prosecutor, though a witness, to remain in the courtroom and give testimony after hearing other witnesses testify, even though the rule of sequestration of witnesses had been called for and invoked, but that the trial court should require the prosecutor to testify first. The court also held that even if it was error for the trial court to refuse to require the prosecutor to be examined first after the rule was invoked, the court could not see that any substantial injury was done to the Defendant upon reviewing the entire record.

The settled rule in the State of Tennessee and elsewhere is that the matter of placing witnesses under the rule or exempting them is one which rests in the discretion of the trial judge and his action thereon will not be reversed unless it is made to appear that he abused his discretion

to the prejudice of the Defendant. **Nance v. State**, 210 Tenn. 328, 358 S. W. (2d) 327 (1962); **Bostwick v. U. S.**, 218 F. 2d 790 (1955); **Charles v. U. S.**, 215 F. 2d 825 (1954); **Johnston v. U. S.**, 260 F. 2d 345, **cert. denied** 360 U. S. 935, 79 S. Ct. 1454, 3 L. Ed. 2d 1547 (1959), and **U. S. v. Brooks**, 303 F. 2d 851, **cert. denied** 371 U. S. 889, 83 S. Ct. 184, 9 L. Ed. 2d 122 (1962), and **Taylor v. U. S.**, 388 F. 2d 786 (1967).

In **Wharton's, Criminal Evidence**, 12th Ed., Anderson, Vol. 3, sec. 840 (1955), cited by the Tennessee Supreme Court in the **Nance** case, *supra*, the author, with supporting authority from several state and federal courts, states:

> "The violation of the order of sequestration does not in itself make the witness incompetent or compel his exclusion" (Vol. 3 at page 209).

In **Wharton's, Criminal Evidence**, 12th Ed., Anderson, Vol. 3, sec. 840 (Supp. 1969), the author further stated, with various state and federal supporting authorities, that:

> "And the court has the discretion to permit the witness to testify although present in the courtroom in violation of the rule."

The Respondent submits that in the instant case the Petitioner has failed to show that the trial court abused its discretion herein and that the question herein involved is not substantial or one of broad national concern. Any possible conflicts in these wtinesses' testimony were immaterial and in view of the fact that the evidence showed that the Petitioner was observed committing these crimes and arrested at the time thereof, there can be no question of any possible error affecting the trial.

CONCLUSION.

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

C. HAYES COONEY,
Assistant Attorney General,
State of Tennessee.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

APPENDIX

C. RAYUS COOLEY,
Assistant Attorney General,
State of Tennessee

EXHIBIT A.

In the Court of Criminal Appeals of Tennessee,
Middle Section at Nashville.

Leo Crumley,
Plaintiff in Error,
v.
State of Tennessee,
Defendant in Error.

Marion
Criminal.

On Petition to Rehear.

The State has filed a petition to rehear our previous action in reversing these two cases because the record shows both that the cases were tried without a jury and by a jury.

The petition calls to our atfention that the bill of exceptions shows affirmatively that the cases were tried by a jury, although the minute entries reflect that the defendant waived a jury trial and also that the trial court heard a motion to set aside the jury verdict. The State relies on the rule that as between the minute entry and a bill of exceptions the bill of exceptions controls.

In **Percer v. State**, 118 Tenn. 765, 103 S. W. 780, the minutes showed the defendant's presence when the verdict was rendered, but the bill of exceptions showed affirmatively that he was not in the courtroom but in the prisoner's room at that time. The court held that the recital in the minutes did not preclude the prisoner from showing the truth that he was not in the presence of the court

on the return of the verdict. The bill of exceptions controlled over the minute entry in that case.

In **Helton v. State**, 195 Tenn. 36, 255 S. W. 2d 694, the minute entry and bill of exceptions conflicted as to whether the defendant excepted to the discharge of a juror. The Supreme Court held that the bill of exceptions controls under these circumstances.

Church v. State, 206 Tenn. 336, 355, 333 S. W. 2d 799, held that in a conflict between the minute entry and the bill of exceptions as to the exact verdict returned by a jury, the bill of exceptions controls.

Since the bill of exceptions here clearly shows that a jury heard the cases, we think the conflict in the record should be resolved by application of the rule that the bill of exceptions prevails over the minute entries when they are in conflict. We are, therefore, constrained to grant the petition to rehear, set aside the judgment heretofore entered and determine the cases on their merits. This court on appeal may correct the erroneous judgments in these cases. See **Cowan v. State**, 117 Tenn. 247, 96 S. W. 973; **Coleman v. State**, 121 Tenn. 1, 113 S. W. 1045.

The defendant below, Leo Crumley, was jointly indicted with one Robert Cross in three cases—burglary in the third degree, attempt to commit burglary, and carrying burglarious instruments. The cases came on for trial in Marion County on July 5, 1967. Cross was not present and the court granted a severance as to him. The defendant requested that all three cases be tried together. The panel of jurors present was not sufficient to select a jury to try all three cases, and the State entered an order nolle prosequi as to the attempt to commit burglary case. The other cases were tried together and resulted in verdicts of guilty, with three years in each case. In accordance with the verdicts, the court sentenced the de-

fendant to three years for burglary in the third degree and one to three years for carrying burglarious instruments.

The State's proof showed that about 11:30 P. M. on February 20, 1967, the defendant and two others broke open the door to the office of Jeff Payne's Coal Yard in South Pittsburg. The defendant was carrying a tire tool used to force open the door; Cross had a sledge hammer and the third person a shotgun.

A special officer, Lee Beene, saw them and notified another officer, William Bynum, who shot twice. Bynum apprehended Cross and the defendant was arrested about twenty minutes later hiding in a culvert under the railroad tracks. He was wearing gloves. He claimed he had been shot, but this was incorrect. The third person escaped and was never apprehended. The defendant did not testify.

The sole assignment of error is that the trial court erred in permitting the witness Lee Beene to remain in the courtroom during the testimony of the witness William Bynum in violation of the rule of exclusion of witnesses.

After the selection of the jury, the witnesses were sworn and placed under the rule. Beene was prosecutor in the case of carrying burglarious instruments; Jeff Payne was prosecutor in the charge of burglary in the third degree.

Payne had completed his testimony and Officer Bynum on direct examination had testified about the breaking and his arrest of the defendant. At this time the assistant district attorney general called to the court's attention that Officer Beene had just entered the courtroom and asked the court if he were subject to the rule of sequestration of witnesses. The court held, over defendant's ob-

jection, that since Beene was prosecutor in one of the cases being tried he could remain in the courtroom.

In **Smartt v. State**, 112 Tenn. 539, 551, 80 S. W. 586, the court held that it was not error to permit the prosecutor to remain in the courtroom after the rule had been called for, but the trial court should require him to testify first. The court further held that, since it could not see that any substantial injury was done by requiring the prosecutor to testify first, there was no reversible error.

The settled rule in this state is that the matter of placing witnesses under the rule or exempting them is in the discretion of the trial judge and his action will not be reversed unless it is made to appear that he abused his discretion to the prejudice of the defendant. **Nance v. State**, 210 Tenn. 328, 358 S. W. 2d 327.

Upon consideration of the entire record, we are satisfied that the defendant has received a fair trial and that there was no prejudice to him by the prosecutor remaining in the courtroom. This assignment is overruled and the judgment of the lower court is affirmed.

Judge Galbreath did not participate in this case.

/s/ Mark A. Walker,
Mark A. Walker,
Presiding Judge.

Concur:

W. Wayne Oliver.

Office of Clerk of the Court of Criminal Appeals
For the Middle Division of the State of Tennessee.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion on Petition to Rehear of said Court,

pronounced at its February term, 1969, in case of Leo Crumley against State of Tennessee as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 3rd day of September, 1969.

(Seal) Ramsey Leathers, Clerk,

By ....., Deputy Clerk.